



August 23, 2012

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National Security Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 6150
Washington, DC 20530-0001

BY U.S. MAIL AND EMAIL — nsdfoia@usdoj.gov

RE: Freedom of Information Act Request
Request for Expedited Processing

Dear Ms. Mallory and Ms. Matthews:

This letter constitutes an expedited request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted to the Department of Justice (“DOJ”), National Security Division (“NSD”) on behalf of the Electronic Frontier Foundation (“EFF”). EFF makes this request as part of its Transparency Project, which works to obtain government records and make those records widely available to the public.

On August 21, 2013, Director of National Intelligence James Clapper declassified and released to EFF a redacted version of a memorandum opinion of the Foreign Intelligence Surveillance Court (“FISC”), dated October 3, 2011 (“October 3 Opinion” cover and relevant page attached hereto).

On page 17 of the October 3 Opinion, the FISC stated that certain collection activities of the NSA implicate 50 U.S.C. § 1809(a) and that the FISC would address those implications in a separate order. That footnote, number 15, reads:

15 The government’s revelations regarding the scope of NSA’s upstream collection implicate 50 U.S.C. § 1809(a), which makes it a crime (1) “to engage[] in electronic surveillance under color of law except as authorized” by statute or (2) to “disclose[] or use[] information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized” by statute. See [case citation redacted] (concluding that Section 1809(a)(2) precluded the Court from approving the government’s proposed use of, among other things, certain data acquired by NSA without statutory authority through its “upstream collection”). The Court will address Section 1809(a) and related issues in a separate order.

Accordingly, EFF hereby requests the following records:

1. The “separate order” or orders, as described in footnote 15 of the October 3 Opinion quoted above, in which the Foreign Intelligence Surveillance Court “address[ed] Section 1809(a) and related issues”; and,
2. The case, order, or opinion whose citation was redacted in footnote 15 of the October 3 Opinion and described as “concluding that Section 1809(a)(2) precluded the Court from approving the government’s proposed use of, among other things, certain data acquired by NSA without statutory authority through its ‘upstream collection.’”

Request for Expedited Processing

For the reasons discussed below, a “compelling need” exists for the records sought in this request, and, as such, EFF is entitled to expedited processing under 5 U.S.C. § 552(a)(6)(E)(v)(II) and 28 C.F.R. §§ 16.5(d)(1)(ii) and (iv).

Expedited Processing under 28 C.F.R. § 16.5(d)(1)(ii)

EFF is entitled to expedited processing because the request pertains to information about which there is an “urgency to inform the public about an actual or alleged federal government activity,” and the request is “made by a person primarily engaged in disseminating information.” 28 C.F.R. § 16.5(d)(1)(ii). The information we request easily satisfies this standard.

First, the records sought by this request undeniably concern a “federal government activity.” *Id.* The records requested here—FISC opinions and orders concerning unauthorized electronic surveillance conducted by the NSA—reflect both on the federal government’s operation of surveillance and on the judicial and legislative oversight of those surveillance activities.

Second, there is an “urgency to inform the public” about the federal government activity. *Id.* As the October 3 Opinion demonstrates, on at least one occasion the FISC has found government surveillance activities unauthorized by statute. Clearly, when the government is acting beyond its congressionally proscribed powers, an “urgency to inform the public” exists.

Moreover, the NSA programs addressed in the requested records are being actively debated by both houses of Congress and are currently subject to at least ten bills pending in the House of Representatives¹ and nine bills pending in the Senate.² With Congressional debate surrounding

¹ H.R. 2399 (LIBERT-E Act), H.R. 2440 (FISA Court in the Sunshine Act of 2013), H.R. 2475 (Ending Secret Law Act), H.R. 2586 (FISA Court Accountability Act), H.R. 2603 (Relevancy Act), H.R. 2684 (Telephone Surveillance Accountability Act of 2013), H.R. 2736 (Government Surveillance Transparency Act of 2013), H.R. 2761 (Presidential Appointment of FISA Court Judges Act), H.R. 2818 (To repeal the USA PATRIOT Act and the FISA Amendments Act of 2008), and H.R. 2849 (Privacy Advocate General Act of 2013).

² S. 1016 (Preserving Freedom from Unwarranted Surveillance Act of 2013), S. 1121 (Fourth Amendment Restoration Act of 2013), S. 1130 (Ending Secret Law Act), S. 1168 (Restore Our

the FISC the subject of such rigorous debate, the need to inform the public about that court's opinions regarding the legality and operation of NSA surveillance is even more pressing. The information we request will help the public and Congress fully understand the current state and legality of FISA surveillance, and to participate in the ongoing debate over whether to expand—or restrict—the oversight capacity of the FISC. Delay in processing this FOIA request could inhibit the ability of Congress and the public to fully analyze and debate the implications of any changes to the statutory authority of the NSA or the FISC proposed in the 19 bills currently being debated.

In two recent FOIA cases brought by EFF, the court found that requests warranted expedited treatment where Congress is considering legislation “and the records may enable the public to participate meaningfully in the debate over such pending legislation.” *EFF v. ODNI*, 542 F. Supp. 2d 1181, 1187 (N.D. Cal. 2008) (citing *EFF v. ODNI*, 2007 U.S. Dist. LEXIS 89585 (Nov. 27, 2007)). Even though the court could not “predict the timing of passage of the legislation” the court granted expedited processing, holding “that delayed disclosure of the requested materials may cause irreparable harm to a vested constitutional interest in ‘the uninhibited, robust, and wide-open debate about matters of public importance that secures an informed citizenry.’” *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Similarly, there is an urgency to inform the public about the information we seek here.

Further, as explained below in support of our request for “news media” treatment, EFF is “primarily engaged in disseminating information” under 28 C.F.R. § 16.11(c)(1)(i).

Therefore, this request meets the standard for expedited processing set forth in 28 C.F.R. § 16.5(d)(1)(ii).

Expedited Processing under 28 C.F.R. § 16.5(d)(1)(iv)

EFF is also entitled to expedited processing under 28 C.F.R. § 16.5(d)(1)(iv) because the subject of the request concerns “a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.”

First, the disclosure of the October 3 Opinion has generated “widespread and exceptional media interest.” See e.g., Charlie Savage and Scott Shane, *Top-Secret Court Castigated N.S.A. On Surveillance*, *New York Times* (August 22, 2013) (page A1);³ Ellen Nakashima, *NSA Gathered Thousands of Americans' E-mails Before Court Ordered it to Revise its Tactics*, *Washington*

Privacy Act), S. 1182 (A bill to modify the Foreign Intelligence Surveillance Act of 1978), S. 1215 (FISA Accountability and Privacy Protection Act of 2013), S. 1452 (A bill to enhance transparency for certain surveillance programs authorized by the Foreign Intelligence Surveillance Act of 1978), S. 1460 (FISA Judge Selection Reform Act of 2013), and S. 1467 (FISA Court Reform Act of 2013).

³ Available at <http://www.nytimes.com/2013/08/22/us/2011-ruling-found-an-nsa-program-unconstitutional.html>

Post (August 21, 2013);⁴ Cyrus Farivar, *Judge: NSA “systematically violated” its own privacy requirements*, *Ars Technica* (August 21, 2013)⁵; *see also Edmonds v. FBI*, 2002 US Dist. LEXIS 26578, *10 (D.D.C. 2002) (noting “extensive media coverage” satisfied by “numerous newspaper articles in the printed press . . . and on TV”), *rev’d on other grounds* 417 F.3d 1319 (D.C. Cir 2005).

Because the October 3 Opinion demonstrates that government surveillance was conducted in violation of the law, the topic necessarily “affect[s] public confidence” in the government’s integrity. 28 C.F.R. § 16.5(d)(1)(iv). Consequently, the records sought in this request satisfy the requirements for expedited processing under 28 C.F.R. § 16.5(d)(1)(iv).

Request for News Media Fee Status

EFF asks that it not be charged search or review fees for this request because EFF qualifies as a representative of the news media pursuant to the FOIA and 28 C.F.R. § 16.11(b)(6). In requesting this classification, we note that the Department of Homeland Security and National Security Agency, among other agencies, have recognized that EFF qualifies as a “news media” requester, based upon the publication activities set forth below (see DHS stipulation and NSA letter, attached hereto). We further note that the U.S. Court of Appeals for the D.C. Circuit has stressed that “different agencies [must not] adopt inconsistent interpretations of the FOIA.” *Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001), quoting *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1287 (D.C. Cir. 1983).

EFF is a non-profit public interest organization that works “to protect and enhance our core civil liberties in the digital age.”⁶ One of EFF’s primary objectives is “to educate the press, policymakers and the general public about online civil liberties.”⁷ To accomplish this goal, EFF routinely and systematically disseminates information in several ways.

First, EFF maintains a frequently visited web site, <http://www.eff.org>, which received 1,314,234 unique visitors in July 2013 — an average of 1,776 per hour. The web site reports the latest developments and contains in-depth information about a variety of civil liberties and intellectual property issues.

EFF has regularly published an online newsletter, the EFFector, since 1990. The EFFector currently has more than 235,000 subscribers. A complete archive of past EFFectors is available at <http://www.eff.org/effector/>.

⁴ Available at http://www.washingtonpost.com/world/national-security/nsa-gathered-thousands-of-americans-e-mails-before-court-struck-down-program/2013/08/21/146ba4b6-0a90-11e3-b87c-476db8ac34cd_story.html

⁵ Available at <http://arstechnica.com/tech-policy/2013/08/judge-nsa-systematically-violated-its-own-privacy-requirements/>

⁶ Guidestar Nonprofit Report, Electronic Frontier Foundation, <https://www.guidestar.org/organizations/04-3091431/electronic-frontier-foundation.aspx> (last visited August 22, 2013).

⁷ *Id.*

Furthermore, EFF publishes a blog that highlights the latest news from around the Internet. DeepLinks (<http://www.eff.org/deeplinks/>) reports and analyzes newsworthy developments in technology. DeepLinks had 116,494 unique visitors in July 2013. EFF also maintains a presence on the social media networks Twitter (more than 140,000 followers), Facebook (more than 67,000 followers), and Google Plus (more than 2,000,000 followers).

In addition to reporting hi-tech developments, EFF staff members have presented research and in-depth analysis on technology issues in no fewer than forty white papers published since 2003. These papers, available at <http://www.eff.org/wp/>, provide information and commentary on such diverse issues as electronic voting, free speech, privacy and intellectual property.

EFF has also published several books to educate the public about technology and civil liberties issues. *Everybody's Guide to the Internet* (MIT Press 1994), first published electronically as *The Big Dummy's Guide to the Internet* in 1993, was translated into several languages, and is still sold by Powell's Books (<http://www.powells.com>). EFF also produced *Protecting Yourself Online: The Definitive Resource on Safety, Freedom & Privacy in Cyberspace* (HarperEdge 1998), a "comprehensive guide to self-protection in the electronic frontier," which can be purchased via Amazon.com (<http://www.amazon.com>). Finally, *Cracking DES: Secrets of Encryption Research, Wiretap Politics & Chip Design* (O'Reilly 1998) revealed technical details on encryption security to the public. The book is available online at <http://cryptome.org/cracking-des.htm> and for sale at Amazon.com.

Request for a Public Interest Fee Waiver

EFF is entitled to a waiver of duplication fees because disclosure of the requested information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(a)(iii) and 28 C.F.R. § 16.11(k)(1)(i), (ii). To determine whether a request meets this standard, the agency determines whether "[d]isclosure of the requested information . . . is likely to contribute significantly to public understanding of the operations or activities of the government," 28 C.F.R. § 16.11(k)(1)(i), and whether such disclosure "is not primarily in the commercial interest of the requester." 28 C.F.R. § 16.11(k)(1)(ii). This request satisfies these criteria.

First, any FISC orders or opinions in the possession of DOJ NSD necessarily implicate "the operations or activities of the government." 28 C.F.R. § 16.11(k)(1)(i). The opinions and orders concern surveillance undertaken by the U.S. intelligence community under Section 702 of FISA.

Second, disclosure of the requested information will contribute to a public understanding of government operations or activities. *Id.* EFF has requested information that will shed light on the intelligence community's interaction with the FISC in the implementation of FISA Section 702, as well as the FISC's interpretation of the legality of those surveillance activities. This information will contribute not only to EFF's understanding of current surveillance activities under Section 702, but to the understanding of a reasonably broad audience of persons interested in the subject. EFF will make the information it obtains under the FOIA available to the public and the media through its web site and newsletter, which highlight developments concerning privacy and civil liberties issues, and/or other channels discussed more fully above.

Finally, since only limited information has been made available regarding surveillance activities under Section 702, the disclosure will “contribute significantly” to the public’s knowledge and understanding of surveillance activities – and the legality of that surveillance – undertaken by the federal government. *Id.* Disclosure of the requested information will help inform the public about the legality of the intelligence community’s actions, as well as contribute to the public debate about the propriety of reauthorizing Section 702.

Furthermore, a fee waiver is appropriate here because EFF has no commercial interest in the disclosure of the requested records. 28 C.F.R. § 16.11(k)(1)(ii). EFF is a 501(c)(3) nonprofit organization, and will derive no commercial benefit from the information at issue here.

Thank you for your consideration of this request. If you have any questions or concerns, please do not hesitate to contact me at (415) 436-9333 x146. As the FOIA provides, I will anticipate a determination on this request for expedited processing within 10 calendar days.

I certify that, to the best of my knowledge and belief, all information within this request is true and correct.

Sincerely,

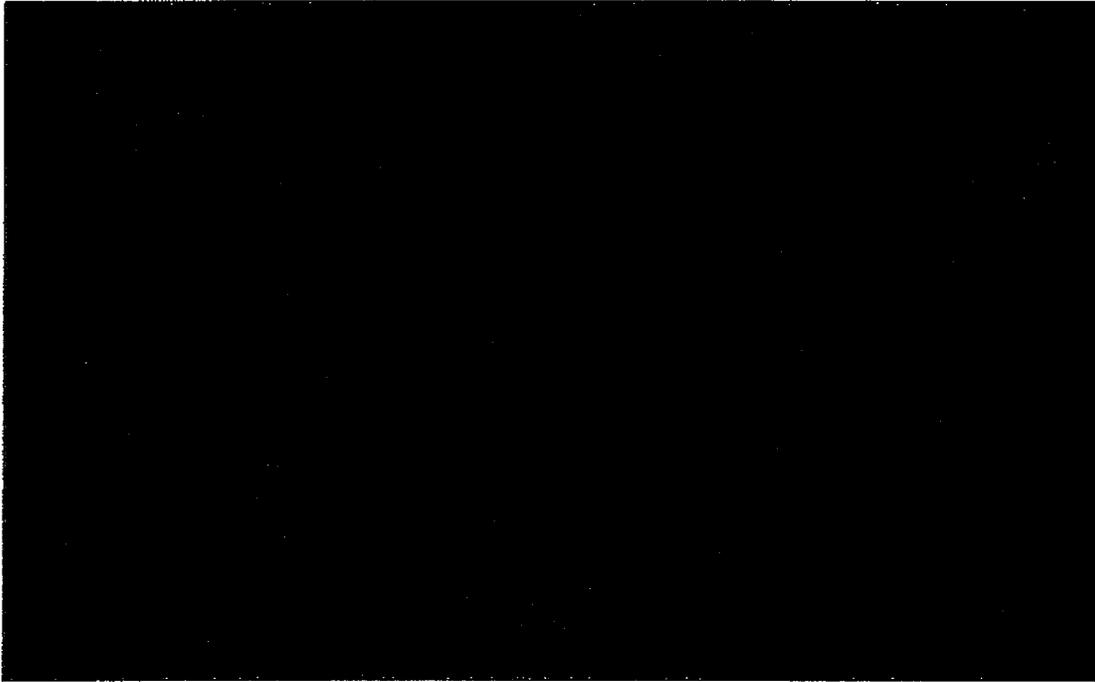
/s/ Nathan Cardozo

Nathan Cardozo
Staff Attorney

Enclosure
cc: Office of Information Policy

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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.



MEMORANDUM OPINION

These matters are before the Foreign Intelligence Surveillance Court ("FISC" or "Court") on: (1) the "Government's Ex Parte Submission of Reauthorization Certification and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certification and Amended Certifications" for DNI/AG 702(g) Certifications

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The government's submissions make clear not only that NSA has been acquiring Internet transactions since before the Court's approval of the first Section 702 certification in 2008,¹⁵ but also that NSA seeks to continue the collection of Internet transactions. Because NSA's acquisition of Internet transactions presents difficult questions, the Court will conduct its review in two stages. Consistent with the approach it has followed in past reviews of Section 702 certifications and amendments, the Court will first consider the targeting and minimization procedures as applied to the acquisition of communications other than Internet transactions – i.e., to the discrete communications between or among the users of telephone and Internet communications facilities that are to or from a facility tasked for collection.¹⁶ The Court will

¹⁴ [REDACTED]

¹⁵ The government's revelations regarding the scope of NSA's upstream collection implicate 50 U.S.C. § 1809(a), which makes it a crime (1) to "engage[] in electronic surveillance under color of law except as authorized" by statute or (2) to "disclose[] or use[] information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized" by statute. See [REDACTED] (concluding that Section 1809(a)(2) precluded the Court from approving the government's proposed use of, among other things, certain data acquired by NSA without statutory authority through its "upstream collection"). The Court will address Section 1809(a) and related issues in a separate order.

¹⁶ As noted, the Court previously authorized the acquisition of [REDACTED] categories of "about" communications. The Court now understands that all "about" communications are acquired by means of NSA's acquisition of Internet transactions through its upstream collection. See June 1 Submission at 1-2, see also Sept. 7, 2011 Hearing Tr. at 76. Accordingly, the Court considers the
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